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No. 72-1497

In the
Supreme Court of the United States
October Term, 1972

WISCONSIN BEARING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Wisconsin Bearing Company, prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit and the findings and conclusions of the National Labor Relations Board's Decision and Order dated September 21, 1971.

OPINION BELOW

The opinion of the National Labor Relations Board, including its findings and conclusions, is reported in full and is appended to the Appendix in full in this petition. A timely petition was filed with the United States Court

of Appeals for the Seventh Circuit to review the National Labor Relations Board's decision; and the National Labor Relations Board filed a cross-application for enforcement of its order. The United States Court of Appeals issued its order on January 18, 1973, enforcing the Board's order without comment on the constitutional issues raised; and on February 6, 1973, the Petitioner's request for a rehearing was denied.

JURISDICTION

There are special and important reasons for granting this writ. The trier of fact admitted in his opinion that he did not match specific testimony as it related to specific specifications in the complaint. This violation of a right so basic to the concept of a fair trial—particularly where a government agency is both the prosecutor and trier of fact—is indeed worthy of this Court's consideration. Also, if a company were deemed guilty of unfair labor practices for merely taking steps to preserve its existence and then explaining to company employees the reason for the steps it had taken, such restrictions on the free enterprise system would greatly handicap the national economy. Recent decisions of the United States Court of Appeals have greatly weakened the employer's right to give their side of issues during a union campaign. We believe it to the national interest, that this Court express itself more explicitly as to the extent to which an employer's freedom of action and freedom of speech should be limited.

The order of the United States Court of Appeals for the Seventh Circuit enforcing the National Labor Relations Board's order was entered on January 18, 1973, and the Petitioner's request for a rehearing was denied on February 6, 1973.

The jurisdiction of the Court is also involved under the Supreme Court rule 19 1(a) and Supreme Court rule 19 1(b).

CONSTITUTIONAL PROVISIONS INVOLVED

1. From the Constitution of the United States:

   Amendments to the Constitution:

   Article I, reading:

   Congress shall make no law . . . abridging the freedom of speech.

2. From the Constitution of the United States:

   Amendments to the Constitution:

   Article V, reading:

   No person shall . . . be deprived of life, liberty or property without due process of law.

THE ISSUES PRESENTED FOR REVIEW

1. Did the National Labor Relations Board violate the Petitioner's right to due process of law when the trial examiner admitted in his opinion that he was not matching specific testimony to specifications in the complaint?

2. Did the National Labor Relations Board violate the Petitioner's right to freedom of speech, when they ruled that comments in the speech read to his employees (appended to the appendix in full) was an unfair labor practice?

3. Should this Court, in view of the confiict between the decisions in the United States Court of Appeals, for the Fifth Circuit and the United States Court of Appeals, for the Seventh Circuit; resolve the question as to whether a Court should take into consideration employee turnover since the date of the union election?

STATEMENT OF FACTS

The Petitioner is engaged in the business of selling and distributing ball and roller bearings, mechanical power transmission equipment and related items. The Petitioner is not a manufacturing company and operates on a narrow profit margin. In the fiscal year ending August of 1970, it suffered a 40% drop in profit from the previous year and the gross sales for the last six months of 1970 decreased 11% in the Milwaukee branch alone. In June and July 1970, the Petitioner reduced the work week and in August, 1970 reduced the personnel permitted to work overtime on Saturday by 85% and on August 5, 1970, he discontinued one sales territory and terminated an outside salesman. Inventory was reduced to a *minimum*. Prior to August 17, 1970, personnel leaving the warehouse had not been replaced and delivery drivers had been reduced in number from seven to five.

In order to cut overhead and better service customers in the Butler, Wisconsin area, the Petitioner had made plans to open a branch in that area, by having facilities closer to its customers. At the time of the hearing, the Petitioner had already made arrangements with Melker Realty Company whereby the latter had agreed to reserve 7,500 feet for the Petitioner in a building in Butler, Wisconsin.

In mid-August, 1970, the Petitioner instructed his department heads to terminate one employee in each department. On August 24, 1970, employee John Schaetzel, having the worst absentee record was terminated in the warehouse; Roger Field, the last trainee hired, was terminated in the machine shop; Michael Klaus, a student and summer employee was terminated; and Barbara Neary was terminated in the purchasing department.

The Petitioner denies that at the time of these discharges, it had any knowledge of Union activity and/or sympathy by any of these particular employees.

No evidence was introduced that the Petitioner knew that Klaus or Neary were interested in the Union. There was no evidence that Neary was in fact interested in the Union.

On August 26, 1970, the Petitioner distributed a leaflet to all employees explaining that these employees had been laid-off for economic reasons.

On September 23, 1970, the Petitioner, in a further effort to reduce overhead, terminated four more employees, Matajac, Behling, Morris and Eisch. They had the lowest seniority in their departments. There was no evidence that the Petitioner had knowledge of Union activity on the part of Behling, Morris, or Eisch.

On October 14, 1970, October 26, 1970 and November 3, 1970, the Petitioner's branch manager had group meetings with the employees. The Petitioner's attorney was present and the branch manager answered questions propounded by employees, explained company benefits then in effect, discussed the wage program then in effect, discussed the economic problems then confronting the Company and the steps being taken to overcome the problem. He also explained what *might* or *could* happen in the event the Petitioner was unable to meet Union demands and a strike ensued.

On November 3, 1970, he read from a written speech which the Trial Examiner admits "substantiates" what was said at the other meetings. This entire speech has been admitted in evidence and included in the appendix.

On November 12, 1970 an election was held and the Union failed to obtain a majority of the votes.

The General Counsel filed complaints alleging various violations of §8(a)(1), (3) and (5) of the Act. From January 11, 1971 through January 14, 1971, a hearing was held before the Trial Examiner. After the hearing the parties filed their briefs.

In its Brief, Petitioner attempted to demonstrate there was insufficient evidence to support any of the numerous allegations in the Complaint by matching and weighing all relevant testimony as it pertained to each specification. The Trial Examiner, in his decision, stated that because the evidence is *largely interrelated,* it did *not lend itself* to matching testimony to each specification in the Complaint. He stated further that since certain allegations in the Complaint were *general,* he could only *summarize the nature of particularized violations.* Without deeming it necessary to match specific testimony to the specifications, the Trial Examiner then made 12 specific findings of restraint and coercion, a finding of an incident of surveillance, nine specific instances of violations in the speeches, and violations of discrimination in withholding raises and in laying-off personnel.

REASONS FOR GRANTING THE WRIT

I

The Trial Examiner's Refusal to Match Specific Testimony to Specifications in the Complaint Was a Denial of Due Process of Law as to the Petitioner.

In rendering his opinion, the Trial Examiner stated:

> The evidence is largely interrelated and does not lend itself to treatment, as Respondent has drawn its brief, by attempting to match specific testimony to each specification in the Complaint. Certain of the allegations are stated in terms of general conclusions as, for example, that Respondent in the speeches threatened employees "with an atmosphere of hatred, bitterness, strikes, and unspecified hostility and acrimony in the event the Union was selected." Such a conclusion, if made, can only be derived from a general context or a course of conduct, and would be appropriate, in my view, only to summarize the nature of particularized violations.

If the trier of fact were to reach his conclusion without matching the testimony to a specification in the Complaint—regardless of how general the "specifications" were—what method could he use to reach his conclusions? If the Trial Exaimner did not consider each specification individually, considering and weighing all the evidence—pro and con—pertinent to a specification, before reaching his decision: he would of necessity either (1) consider testimony that was *not* properly matched to the particular specification in the Complaint or (2) reject consideration of testimony that *was* properly matched to the particular specification. In the one case the Trial Examiner would be considering irrelevant and/or immaterial testimony; in the other case he would be failing to give due consideration to testimony that *was* relevant.

In *Donnelly* v. *NLRB*, 123 F2d 215 (1941), at page 224, the Court stated:

> "That a refusal by an administrative agency such as the NLRB to receive and *consider* competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate . . . that the Board would or might have reached no different conclusion had the rejected evidence been received is entirely beside the point. The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties, had been received and *considered*." (Emphasis added)

See also *NLRB* v. *Burns*, 207 F2d 434 (1953), *St. Joseph* v. *U.S.*, 298 U.S. 38 (1936); *Ohio Bell* v. *Public Utility Company of Ohio*, 301 U.S. 292 (1937); *Donnelly* v. *NLRB*, 151 F2d 854 (1945).

In the previous quotation from the Trial Examiner's opinion, he seems to rationalize his departure from the usual method of matching testimony to each specification in the Complaint on the fact that the "evidence is largely interrelated." We fail to understand why this should make any difference. Surely the fact that certain testimony might be pertinent to one or more specifications in the Complaint should not mean that it should not be matched with each specification to which it was pertinent. Each specification in the Complaint should be considered separately and all testimony pertinent thereto should be matched in the light of all other evidence pertinent thereto.

It seems clearly improper to deviate from this logical procedure merely because certain testimony might relate to more than one specification. If such deviation were permitted, the prosecutor in any criminal or quasi-criminal

case could "muddy the waters" and preclude a fair analysis and weighing of the evidence as to a specification in a Complaint by merely increasing the number of specifications to which certain testimony might be even remotely relevant. Such prosecutor would then have an unfair advantage just because the evidence would then be "interrelated" and "not lend itself to treatment". . . of matching "specific testimony to each specification in the Complaint."

At the time of oral argument, the Appellate Court pointed out there is no legal requirement that a trier of fact list in his written opinion all the evidence as it pertains to issues. We agree with the Court; but surely it is fundamental that the trier of fact give consideration to and mentally weigh all the evidence as it pertains to each issue.

In what other way could a litigant receive a fair trial? The right to have all evidence properly considered is so basic, that unless the trier of fact states to the contrary, it would be assumed he matched all evidence as it pertained to specifications in the complaint. If, however, as in this case, the trier of fact *admits* he is not considering evidence in such a manner and states he is "summarizing the nature of particularized violations" from mere "conclusions in the allegations;" he admits use of a method that is a violation of due process of law.

II

Finding the Petitioner Guilty of Unfair Practices Because of Comments Made to His Employees Was a Violation of the Petitioner's Right of Free Speech under the First Amendment.

A written speech read to the employees 24 hours prior to the election is the real crux of the findings against

the Petitioner arising from his comments. This written speech is reported in full and included in the appendix. There was evidence of other oral comments made to the employees—some of it contradicted by other evidence—but the Trial Examiner admits that it was the written speech which substantiated the other comments. There were were nine specific findings of alleged violations relative to Petitioner's comments to the employees. We respectfully submit that to find any unfair labor practices in the written speech reported in full and appended to the appendix, would be to completely handcuff an employer and put him completely at the mercy of the union organizers.

III

There Is Conflict between the U. S. Court of Appeals for the Seventh Circuit and the U. S. Court of Appeals for the Fifth Circuit as to Whether Employee Turnover Since the Bargaining Order Should Be Considered in Determining Whether or Not the Order Should Be Enforced.

In its brief, the National Labor Relations Board cited a case of the U. S. Court of Appeals for the Seventh Circuit, *NLRB* v. *Kostel,* 440 F2d 347 (1971), which held that, in making a determination of whether or not a Board's order should be enforced, that Court *would not* consider employee turnover since the date of the bargaining order. In filing its brief, the Board was well aware of a Fifth Circuit case, *NLRB* v. *American Cable,* 427 F2d 446 (1970) (cited within *Kostel*), which held that employee turnover *should* be considered in determining whether or not an order should be enforced. In its petition for rehearing, this Petitioner urged that the case be remanded to the National Labor Relations Board with instructions to take additional evidence relative to changes in the Petitioner's personnel since January 1971, the date

of the hearing before the Trial Examiner. The petition was denied.

We submit that the rule of *NLRB* v. *American Cable* is the better rule. If the Petitioner could show there had been such personnel turnover that far less than a majority of the current employees voted for the Union, it would seem a violation of the employees' right to union selection to force a majority of the employees to accept a union for which they never had the opportunity to vote. Also, it would seem that evidence of such "employee turnover" would show the impossibility that any unfair labor practices in the first election would have any "lasting effect" and preclude a fair second election. Under such circumstances, a direct bargaining order as permitted under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), would appear inappropriate.

The question of whether a Court should consider evidence of "employee turnover" in determining whether or not an order should be enforced is extremely basic and plays a most important part in the outcome of many of the labor cases coming before U. S. Courts of Appeals. With the Seventh Circuit of the U. S. Court of Appeals being in conflict with the Fifth Circuit of the U. S. Court of Appeals on such a key issue, it seems important that this Court clarify the law on this point so that the law be uniform in all of the United States Courts of Appeals.

CONCLUSION

For the foregoing reasons, this petition for a writ of Certiorari to review the opinion of the U. S. Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA

Before The National Labor Relations Board

Cases 30 CA 1361
30 CA 1394
30 CA 1420
30 RC 1338
30 RC 1334

DECISION AND ORDER

On April 28, 1971, Trial Examiner Benjamin B. Lipton issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action as set forth in the attached Trial Examiner's Decision. He further recommended that the election held on November 12, 1970, be set aside and the petitions in the representation cases be dismissed. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finals that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in the proceeding and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

[1] The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of The Trial Examiner and hereby orders that Respondent, Wisconsin Bearing Company, Milwaukee, Wisconsin, its officers, agents, successors, and assigns shall take the action set for in the Trial Examiner's recommended Order.

Dated, Washingto, D.C. Sept. 21, 1971

John H. Fanning, Member
Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
National Labor Relations Board.

(Seal)

UNITED STATES OF AMERICA

Before The National Labor Relations Board

Cases No. 30 CA 1361
30 CA 1394
30 CA 1420
30 RC 1338
30 RC 1334

Dennis N. Selby, Esq., and James R. Denbo, Esq., for the General Counsel.

Treacy & Clifford, of Chicago, Ill., by Jack F. Clifford, Esq., for the Respondent.

Podell & Ugent, of Milwaukee, Wis., by Alvin R. Ugent, Esq., for the Charging Party or Union.

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[1] (Continued)
established policy not to overrule Trial Examiner's resolutions with respect to credibility unless a clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3) We have carefully examined the record and find no basis for reversing his findings.

TRIAL EXAMINER'S DECISION

Statement of the Case

BENJAMIN B. LIPTON, Trial Examiner: In the successive complaint cases, the General Counsel alleges various independent violations of Section 8(a)(1), (3) and (5) of the Act.[1] The representation cases, 30-RC-1338 and 1334, involve petitions for certification filed by the Union, respectively, on September 1 and September 10. Pursuant to a Decision and Direction of Election issued by the Regional Director on October 12, after a hearing, an election was conducted on November 12 in an appropriate unit of all employees, including office clericals, confined to the Milwaukee plant. At the election, of approximately 86 eligible voters, the results were as follows: 37 votes for Petitioner; 39 votes against Petitioner; 1 void ballot; and 8 challenged ballots.

Timely objections were filed by the Union. On December 22, the Reginal Director issued a report on the objections and challenges and an order consolidating the complaint and representation cases, particularly the surviving issues on objections and challenges,[2] for the purpose of a hearing before a trial examiner. The objections are broadly coextensive with the complaint allegations. Respondent's answers to the complaint generally deny the alleged violations. From January 11 through January 14, a hearing in the consolidated proceeding was held before me in Milwaukee, Wisconsin. All parties appeared at the hearing and were afforded

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[1] All dates are in 1970, unless otherwise noted. The initial complaint, 30-CA-1361, was issued September 23, and the charge thereon filed and served August 25. In 30-CA-1394, the charge was filed and served September 24. In 30-CA-1420, the original charge was filed and served October 29, and amended charge was filed November 17.

[2] One of these challenges made by the Board agent was sustained in the Regional Director's report and is not involved herein.

full opportunity to present relevant evidence and to argue orally on the record. Briefs received from the General Counsel, the Respondent, and the Union have been duly considered.

On the entire record in the cases, and from my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is engaged in the business warehousing, selling and distributing ball and roller bearings, mechanical power transmission equipment, and related items. Only its principal facility at Milwaukee, Wisconsin, is directly involved herein. In addition, it has branches in Green Bay, Wausau, Appleton, Racine and Madison, all in Wisconsin, and in Ishpeming, Michigan.[3] During the year preceding issuance of the first complaint, Respondent had a direct inflow and direct outflow of products in interstate commerce, and in each instance valued in excess of $50,000. Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

The Union, also referred to herein as the U.E. or the Charging Party, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. Background Summary of Events

In the general period of July and early August, the initial conversations on the subject of having a union

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[3] It appears in the testimony that Lester Berry, president of Respondent, is virtually the sole stockholder, and that he operates allied companies, called Berry Bearing Company, Bearing Service Company, and Illinois Bearing Company.

took place in the machine shop. John Schaetzel, employed in the warehouse, discussed with John Matajac, Robert Fields and Dennis Martin, machine shop employees, certain dissatisfactions concerning their wages and conditions of work. On August 17, Matajac, who had previously worked in a shop represented by the U.E., suggested that they approach this union. On August 18, Schaetzel visited the Union and consulted with Richard Massman, a field representative. Schaetzel was given certain organizational material to distribute, and arrangements were made for a meeting of employees at the union hall on August 20. On August 19, Schaetzel conveyed this information to Matajac, Fields and Martin, gave them pamphlets, and the solicitation of other employees was begun. Schaetzel spoke on company premises with various employees, including, e.g., Linda Morris, Arlene Eisch and Mildred Meier. Fields also approached two named employees. On August 20, in the evening, the meeting at the union hall was held with Massman, who discussed organizational procedures. The 11 employees present at the meeting all signed union authorization cards, including Schaetzel, Fields, Matajac and Morris.[4] Blank cards were taken for further distribution. Schaetzel and Fields, respectively, were elected chairman and secretary of the organizing committee. Thereafter, solicitations were undertaken to obtain additional union authorizations, and further meetings with employees were held at the union hall. Cynthia Behling signed a card on August 24, attended the second union meeting, and solicited all the girls in her "cardex" section, as well as some in "expediting."[5]

On August 28, the Union sent Respondent a letter in which it demanded recognition, requested a bargaining

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[4] Others were Martin, James Bussard, Dennis Schlamm, Pat Strzyzewski, Nancy Gauger, Nancy Miller, and Michael Klaus (whose signed card bears the date of August 20).

[5] Bussard and Strzyzewski also passed out cards.

meeting, and offered to prove majority representation through a neutral party by a payroll check against signed authorization cards. On September 4, Respondent replied, stating that it doubted the majority claim and inviting the Union to file an election petition with the Board.[6] There are alleged incidents of coercive conduct by Respondent beginning August 21, as described infra. On August 24, alleged discriminatees Schaetzel, Fields, and Barbara Neary and on August 28, Michael Klaus, were terminated or laid off—(a matter in dispute). On August 26, Respondent distributed a leaflet to all employees denying alleged accusations of the Union that Schaetzel and Fields were discriminatorily discharged, and asserting that they were included with several people, naming Neary and two others, in a "general layoff" for economic reasons, and that all these laid off employees would be recalled in the event of a a "business upswing." On September 23, Eisch Matajac, Morris, and Behling were terminated or laid off—also alleged as violations.[7] In evidence are a series of preelection campaign leaflets, dated on and after October 21, disseminated to employees by Respondent.[8]

Concurrently, scheduled speeches on the subject of the Union were delivered to assembled employees on company time and premises. On October 14 and October 26, the speeches were made to four different groups of employees on each date; on November 3, the speeches were made to three such groups; and on November 11, the speech was purportedly read from a prepared text to an overall group of about 75 employees. Questions from employees were invited and discussed at all but the last meeting. C. E. Werner, vice president and general manager of Respondent, did substantially all the

[6] At this time, a petition had already been filed on September 1.

[7] Respondent's position in this case is that all the alleged discriminatees were terminated.

[8] General Counsel relies on these exhibits for corroborative purposes, but does not allege violations per se.

talking at the meetings, with Attorney Clifford present except during the final speech. On November 12, the election was conducted, as earlier described.

Werner indicated the hierarchy at Milwaukee: Immediately under him is his assistant, Harry Gaffney, then Lawrence Carpenter, Michael Joyce and Elaine Klenz. The top salesman at each branch is the manager there. Werner is in charge of all operations, and makes the ultimate decisions in all hiring, discharge, wage and policy questions.

B. Essential Issues

Under Section 8(a)(1) are numerous allegations of threats of plant closing, layoffs, job loss, union-provoked violence, and other detriments; a variety of threats described in terms of general conclusions; specific instances of interrogation; surveillance of a union meeting; wage increase as inducement; withholding wage reviews and increases; promise of improved health insurance; suggesting the employees seek some labor organization other than the Union; and others.[9]

Under Section 8(a)(3) are alleged the discriminatory layoffs of eight employees, previously noted, and the transfer of James R. Bussard to a less desirable job.

Under Section 8(a)(5), the main issue raised is that of a refusal to bargain on evidence of a majority of

[9] The evidence is largely interrelated and does not lend itself to treatment, as Respondent has drawn its brief, by attempting to match specific testimony to each specification in the complaint. Certain of the allegations are stated in terms of general conclusions as, for example, that Respondent in the speeches threatened employees "with an atmosphere of hatred, bitterness, strikes and unspecified hostility and acrimony, in the event the Union was selected." Such a conclusion, if made, can only be derived from a general context or a course of conduct, and would be appropriate, in my view, only to summarize the nature of particularized violations.

union authorization cards preceding the election, with principal reliance placed on the Gissel case[10] to justify a bargaining order based upon Respondent's extensive" and "pervasive" unfair labor practices. In addition, it is alleged that Respondent unilaterally improved employee health insurance, and that it requested employees to submit their grievances directly to Respondent (i.e., bypassing the Union).

C. Specifice Incidents of
Restraint and Coercion

1. Michael Joyce is the overall supervisor of the machine shop and warehouse, which is inclusive of the delivery functions. On Saturday, August 22, Joyce came to the home of Mildred Meier, a truckdriver. Meier testified to a conversation between them in her backyard. He asked if she knew anything about this union business. She said no. He asked if she knew "who the ringleaders were or the instigators, some word like that." She said no, although she thought it was Roger Fields in the machine shop. He said, "I think I know who's behind it, Roger in the machine shop and John Schaetzel." He had never visited before at her home.

Joyce testified, in substance, that he regularly drove by Meier's house on his way to and from work. In early August, she had bought materials at the warehouse for her husband's racing car. He previously noticed this car in the yard when he passed by. On August 22, about 3 p.m., he was returning from the office[11] with his young daughter and her friend and stopped to talk to Mr. Meier and one of the sons when he saw them working on the racing car. Someone then went to get Mrs. Meier. He first became aware of any union activity on August 26 upon being handed a union leaflet outside the plant. He

[10] N.L.R.B. v. Gissel Packing Co. 3395 US 575

[11] Earlier he stated he was coming from his home on the way to the office.

had not discussed the Union with Mrs. Meier, and never talked to her about Schaetzel and Fields.

The evidence as to this incident in particular has been closely examined. By her demeanor, the detailed nature of her version, and other factors in this record, I am persuaded of the trustworthiness of Meier's testimony. Joyce is not credited that he lacked knowledge of the Union until August 26. He did not attempt to give affirmative testimony of his conversation with Mrs. Meier; and the circumstances he described of the visit to her house are much less than convincing.

2. Under Joyce, the machine shop consisted of three full time employees, Fields, Matajac and Martin; three regular part time employees, Murphy, McGill, and Gumm; and two employees who worked only when called, Knitchik and Fretchel. On August 21, Fields solicited Murphy and McGill,—neither of whom signed a union card. On August 24, in the morning, Fields was laid off by Joyce. Later in the day, Matajac heard Werner, Joyce and Murphy discuss the Union. Then Murphy came to Martin and Matajac and related that Werner had told Joyce not to hire anyone who has a union in mind. Matajac's testimony is not controverted.

3. On Monday, August 24, Betty Bigelow, a truckdriver, returned to work after a vacation. During that week, when Joyce brought packages to her at the loading dock, he asked if she knew who besides Nancy (Miller) were going to union meetings. She said she did not know.

The following week, while she was having lunch in the machine shop, Joyce inquired if she had signed a union card, and she said, yes. He asked if she knew whether "Millie" (Meier) had signed, and her reply was she thought Millie had. He then stated, "I don't know what you people are doing . . . because Mr. Werner said if you go on strike, you can strike six months or longer. He didn't care."

Joyce denied that he spoke to Bigelow concerning the Union before August 26. He gave shifting testimony as to a possible conversation after such date. However, referring to early September while Bigelow was on the loading dock, he had inquired if there was a big discussion at her house about the Union and what did her husband think of this. She answered that her husband's advice was to do what the majority does. Bigelow is credited as to both incidents.

4. In mid-August, Joyce approached Nancy Gauger and Nancy Miller at the wrapping table. He asked if they heard any rumors about a union being started. They answered affirmatively. He asked if they were going to join. Gauger said, "definitely," and as Joyce walked away, Miller said she would, too.

5. In mid-August, Schaetzel overheard the following conversation at the shipping table from a distance of 15-20 feet: Joyce asked Michael Klaus if he knew anything about the Union, and which of the employees were involved. Klaus did not testify, and Joyce was not questioned.

6. As Dennis Martin testified,—on August 26, in the morning—

> Mike Joyce came up to me and said I hope you have nothing to do with what's going on around here. And he said because if you do, he said you could cost me my job plus your own because the old man wants to close the machine shop the way it is. And I asked him who he meant, Berry or Cy Werner, and he said Cy Werner. He said that they could get along without the machine shop, and he said well, what do you want? He said we could get along just with the bearing repair. We don't need the machine shop and Cy was thinking of closing it in the first place.

Joyce did not recall a conversation with Martin regarding the Union, not directly. He proceeded to ex-

plain that there were numerous group discussions on this subject in the machine shop. About August 27, the men (e.g., Martin, Matajac) were taking about the Union getting a raise of $2 an hour. Joyce interjected that Werner was losing money on the machine shop for years and was thinking of shutting it down. If it was losing money now, what do you think Werner would do if he had double the wages (with the Union)? Then he said, "if it was me I'd close it down; what do you think? And this was the basic conversation I had with Dennis." Martin's version is accepted.

7. About August 28, Joyce came to Matajac and inquired if there was going to be a union meeting. Matajac said there was, and asked Joyce if he had signed a card. Joyce retorted that he would not sign a card because the Union was trying to take food out of his family's mouth. And he said, "I'll remember you for this." This utterance was repeated two or three times whenever Joyce came into the machine shop that day. Martin overheard part of the conversation: Matajac told Joyce he could not go to the meeting because he was a supervisor. Joyce argued that he had a right to go and listen at the meeting that night, and would see his lawyer about it. Joyce was yelling at Matajac, "I'll remember you, John." In his testimony, Joyce denied ever telling Matajac, "you'll be sorry."

8. On September 23, Cynthia Behling was informed by Supervisor Carpenter that she was being laid off from the cardex section. Her testimony is undisputed that he told her—"because of the Union, we would have to lay off by seniority," and "before the union . . . they could 'pick and choose' who they wanted to lay off."

Concluding Findings

The various incidents described above were fully litigated within framework of the complaint. Violations of Section 8(a)(1) are found as follows: (1) On August

23, interrogation by Supervisor Joyce of Meier as to her own union activity and that of other employees. (2) On August 24, the threat by Werner, in Murphy's presence, not to hire employees who have a union in mind. (3) In mid-August, two instances of interrogation by Joyce of Bigelow as to her own union activity and that of other employees. (4) In mid-August, interrogation by Joyce of Gauger and Miller. (5) On August 26, interrogation by Joyce of Martin and threats of job loss and closing the machine shop. (6) As General Counsel stated at the hearing that a violation is not specifically alleged, the evidence that in mid-August Joyce interrogated Klaus in a similar vein, as above, is considered only for corroborative purposes. (7) About August 28, interrogation by Joyce of Matajac whether there was going to be a union meeting, and threatening Matajac with reprisal, because the Union would take food from the mouths of Joyce's family. (8) On September 23, Carpenter's statement to Behling implying that the existence of the Union was the reason for her selection for layoff, since Respondent would otherwise not resort to seniority but would "pick and choose." The clear and intended impact of this statement was coercively to place the onus on the Union for her layoff.[12]

D. Surveillance

On October 22, at 7:30 p.m., a previously announced meeting of employees was to take place at the union hall. At 7:45 p.m., Supervisor Carpenter appeared in the vestibule of the building, from which a short hallway led to the assembly hall where the employees were seated facing in the direction of the hallway. Carpenter saw

[12] The series of interrogations by Supervisor Joyce during the same time period are scarcely isolated, as argued by Respondent, but plainly fall into a coercive pattern, especially when considered in the context of the other unfair labir practices committed. See Blue Flash Express, Inc., 109 NLRB 591; Mitchell Plastics, Inc., 159 NLRB 1574.

a former employee, Joe Galinsky,[13] and asked him to get Massman, the union organizer. Shortly Massman arrived. He saw Carpenter standing in the hallway viewing the assembly hall. The substance of the discussion was that Carpenter wanted to know "what is going on," and sought to attend the meeting. Massman told him he could not do so as it was a violation of the law. He agreed to talk with Carpenter and provide him with information at a subsequent time. Massman left to get a business card. On returning with the card, Massman saw Carpenter standing in the vestibule at a place where he could be viewed by some of the employees in the meeting hall. While both were talking in the vestibule, people passed by. Carpenter departed from the union hall after he was given Massman's business card. Excepting Galinsky and Massman, the only people at the union hall were employees or those recently laid off.

Carpenter testified that he had seen a union pamphlet that morning which charged that Respondent, in speeches to the employees, had misrepresented the facts on items such as insurance and profit sharing. He showed Massman the pamphlets at the union hall and said he wanted to attend the meeting to hear what was going to be said about it, for his own information, as he was also a beneficiary of those benefits. During his visit to the union hall, he did not see any employees whom he recognized.

Two employees, Ella Brinkman and Virginia Stys, from their car outside the union hall, observed Carpenter enter and leave. While waiting outside, Brinkman saw a "couple" of employees go in. She had also seen Don Spot, a telephone salesman, through the outside window of the union hall. As a consequence, Brinkman and Stys decided not to attend the meeting. April

[13] Galinsky was the "boy friend" of an employee and accompanied her to the meeting.

Glatch, inside the assembly hall, could hear Carpenter talking to Massman, although she could not see him. From a long window on the street, a passerby could look into the meeting room and see the employees.

It is entirely evident that the employees at the union meeting were aware of Carpenter's presence at the union hall. Whether Carpenter saw any of these employees is immaterial, although he had ample opportunity to do so. It is most difficult to accept Carpenter's version that he was innocent of any intent to engage in surveillance. He holds a high position in charge of the purchasing department and the data processing, and has been employed in a supervisory capacity for 4 to 5 years. The union campaign had been actively under way within Respondent's knowledge since August. Respondent had already undertaken speeches and distribution of literature to the employees. It strains credulity that Carpenter was so naive as to think he would be admitted to the union meeting or that he could accomplish his stated purpose at the union hall. The true facts as to the insurance and profit sharing benefits were more readily accessible to him in management than the Union. The alleged discriminatory layoffs had already taken place, and the Union's charges had been filed with the Board. The scheduled election was less than three weeks off. It is a realistic assumption that, as of October 22, the union-minded employees, were acutely apprehensive of their job security. The fact of Carpenter's appearance at the union hall tended to intimidate those employees present and to deter employees generally from attending union meetings. There was actually such an effect on Brinkman and Stys. Even assuming, as I do not find, that Carpenter came to the union hall for the vague purposes he stated, Respondent must be charged with the knowledge that employees were aware of his presence and could reasonably believe that they were seen by him. Apart from Carpenter's motives, it is the tendency of his conduct to interfere with the employees' Section 7 rights that is controlling. Here there is also

the factor of Respondent's union animus, evident elsewhere in the record. In any case, I am brought to the conclusion that Carpenter's conduct was indeed intended to be and did constitute surveillance, violating Section 8(a)(1).[14]

E. The Speeches

As previously indicated, there were 12 separate speeches, on October 14, October 26, November 3, and November 11, made by General Manager Werner to the assembled employees. During this preelection time period, Respondent also distributed literature, in evidence, relating to matters in the speeches. As to each speech, the employees were told by their respective supervisors of the designated time for them to attend and were, in practical effect, given no choice of refusal. About 20 employees were present at each meeting, except that 40 attended at 9:30 a.m. on November 3, and 75 attended the final meeting on November 11. The obvious purpose of the meetings was to dissuade the employees from supporting the Union, particularly with respect to the forthcoming election. In the speeches, the same pattern of subject matter appears to follow for each of the particular days, and some of the same discussions were repeated on succeeding dates. The meetings were not, as suggested in Werner's testimony, devoted essentially to answering employee questions.

The complaint alleges that, in conjunction with the required attendance of the employees, Respondent made threats, promises and inducements as described in 18 specifications. Numerous witnesses for the General Counsel testified in detail as to specified meetings, although the meetings they attended, in many instances, did not coincide. Undoubtedly Werner's remarks on specific issues varied at different meetings. While some conflicts exist in the testimony of General Counsel's wit-

[14] Kingwood Mining Company, 166 NLRB 957, 958-959; Colo. Well Service, Inc., 163 NLRB 707, 713.

nesses, these are not of any major consequence. On the whole, their testimony is mutually corroborative, substantiated in parts by material in the written speech on November 11, and presents a fairly consistent and clear picture. For Respondent, Werner was the principal witness. Carpenter, who attended on November 3, was not questioned. Fred McClure, a telephone salesman, gave sketchy testimony in answer to very few questions and negligibly contributed to the record. Tyrone Travert, assistant purchasing agent under Carpenter, was questioned only briefly and had virtually no memory of what was said in the meetings. Pearl Rocklin, a billing clerk, was similarly terse, and was plainly confused and unimpressive as to reliability. The latter were certainly not the best witnesses available, and they scarcely covered the major issues of the speeches. While at this point I reserve credibility determinations, the general character of Werner's testimony on the speeches may initially be noted. He could not identify his testimony as to any particular meeting, even though in talking to the employees, he referred to notes in a little black book, and was present in the hearing room through the great part of General Counsel's case. His testimony was well confined to selective questions; he did not attempt to relate in narrative the substance of any meeting; and he failed to meet certain of the significant testimony of General Counsel. He was frequently vague, verbose, unresponsive and, in my judgment, distinctly evasive. Consideration has been given to all the evidence, and essential findings will be made without elaborate detail.

Werner testified that the last speech, on November 11, was read verbatim from a prepared text, and a copy was supplied by Respondent.[15]

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[15] According to Werner, portions of the document he used were crossed out in red pencil to shorten the speech, but that document "disappeared." Later, his attorney (other than Clifford) reconstructed a copy

The November 11 speech will first be considered, as the material therein is relatively fixed and serves to clarify or resolve some of the disputed issues involved in the previous meetings. The following are excerpts:[16]

> You'll notice for the first time in my life I'm talking to you from a written text. I hate to do this but Mr. Clifford tells me that it's necessary. I guess he's tired of so many lawsuits.
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> • • •
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> I really thought that I had done everything I could over the years. . . . [It isn't so because there are quite a number if legitimate complaints and problems that haven't been solved. There appear to be some inequities in the salary situation and there most certainly appears to be less than adequate communication.]
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> • • •
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> [But suppose the union-forced strike hangs on . . . as such strikes have been known to do. . .] what happens to the Company? Well, first of all, we certainly would try to service our accounts through the other branches. Naturally, we would try to get the Butler Branch going soon enough to take up part of the slack here in Milwaukee. . . . And you and I know that our customers aren't going to wait for the strike to be over. That they would have to go to someone else.] Suppose, for example, we lost maybe (30%) of our business here in Milwaukee.

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[15] (Continued)
of the speech by placing masking tape over the portions which were purportedly not read. Pursuant to instructions of the Trial Examiner, the masking was removed, and brackets were inserted to indicate the masked portions. While these portions are not crucial, I take the entire document in evidence as having been read.

[16] The brackets are indicated as to be previously masked portions, supra; parentheses show interlineations in Respondent's handwriting.

Then when the strike ended, we could have lost maybe (30%) of our jobs. . . . But if you were one of the (30%) who found himself or herself, in these increasingly bad times, looking for a job that couldn't be found, you might then wonder if it was all worthwhile.

* * *

And Mr. Clifford has told us that, under the law, in an economic strike we're entitled to keep operating, we're entitled to hire replacements to permanently replace anyone who goes on (such a) strike.

* * *

But suppose there was union provoked violence? If you wanted to come to work, would you be willing to try to walk through a line of people using foul language and pushing and shoving? As you well know, these things do happen on some picket lines. And no union that I've ever heard of uses only company employees on a picket line. They generally have a fair number of pretty rough customers that they bring in from other places. Unfortunately, the law says this is perfectly legal. So if you have some idea of walking through a picket line composed only of your friends, and just having some kind of a gentle, lady-like discussion, give it another thought. You could easily be confronted by some real tough customers that you didn't know and who didn't know you and couldn't care less about you.

As you well know, it's our sincere hope that you will feel that you really don't need an outside union. But in any event, it would seem that this one is probably among the least suitable ones that could possibly be found. Now to the best of our knowledge, they have four contracts here in Milwaukee. So far as we can find out, not in one single instance do they represent any office people.

* * *

I'm sure you realize that not all unions are the same—any more than all companies are. And that

there has just got to be something really different about this one—else why were they thrown out of the AFL-CIO?

* * *

Nor have they ever denied that for years they jumped on the bandwagon of every Communist [backed] cause in the United States! . . . And three men who were the top men of this union then are still the three top men.

* * *

As you know, I recently reviewed the salaries of every individual person here. While there certainly are cases where increases weren't granted [where they should have been], there have been substantial increases granted and there have been regular and periodic increases granted.

* * *

. . . we are even right now trying to work out transfers to save jobs that may be threatened by the tailspin in business.

* * *

[We've tried to save jobs where we can and] if this Butler situation works out the way I would like it to work out, it's entirely possible we can save everybody's job (who wants to continue to work here, with no los of seniority).]

* * *

[You know our sales are down and I'm telling you now our profits are off by 50%.] If there was ever a time when a union could do harm in this little place, it must be right now.

* * *

You you know of one single instance, just one, where any non-union company took anything away? Of course not! But I know of a company where a union bargained away a cost-of-living plan to get a dues checkoff!

* * *

I guess I've painted a pretty gloomy picture of what the future could be here with this outside union in here. Frankly, I'm scared of why they might do. I honestly believe that they not only could but would, do harm—harm that might be impossible to repair.

• • •

As you know, we're trying very hard to minimize the impact of loss of business. As I mentioned, in the big unionized plants, they don't make any such efforts at all. When business is down, people are sent home. It's as simple as that. We don't want to be that way. . . . For example, we'd like to be able to staff the Butler office with people from here —people who want to go.

• • •

If you are sincerely convinced that there is no hope at all for you with your own company—and also sincerely convinced that this particular union is the best one for you—then I suppose you will feel you must vote against us.

Turning to the earlier speeches, made without script, the following is the substance of General Counsel's testimony:[17]

The October 14 Meeting

Werner asked why the employees did not go to him with their problems instead of going to the Union. With a union, there would be a "wall" between him and the employees, and they couldn't see him any more with their problems but would have to go first to a union representative.

If the Union came in, and he could not meet the union demands, there would be a union-forced strike.[18] He

[17] Of practical necessity, for clarity, and as I view the rounded substance of the testimony, the particular subjects described are partly in composite form covering more than one meeting.

[18] Strikes were mentioned at every meeting.

did not even know what the demands would be.[19] If there was a strike, the Company would just have to close the Milwaukee plant and operate out of other branches. If there was a strike, the Company would lose its customers, and therefore it would go bankrupt.

In order to meet the Union's demands, he would have to raise the prices, and customers would go to the competition which did not have a union. As a result of this, more people would be laid off, and possibly the plant would close. He couldn't afford to pay union wages, and because he could not raise his prices, he would go broke.

If the Union go in (and obtained a union shop), he could fire them for not paying dues. Attorney Clifford (at some meetings at least) explained the operation of a union shop and a checkoff, and the requirements for paying dues.

If the Union got in, he would not have the power to hire, or to fire, even if the employee was a "goof off."

He was looking for a building to open a new branch in Butler[20] in order to provide better service for customers in that area. He had to go to Butler because he was really going broke, and that was where the big companies were. There would be job opportunities and some employees might be transferred out there instead

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[19] Some of the General Counsel's witnesses testified he did not make such a statement. Werner testified that he did. However, on the evidence, he might well have made different remarks at the four meetings conducted on October 14. In either event, I do not find that this comment is materially significant.

[20] Located in Wisconsin, about 11 miles from the Milwaukee plant. Werner testified that, at a subsequent date, Respondent had leased a portion of a building, which it expected to occupy in late January or February. Construction of the building was started after his speeches.

of being laid off. If the Union got in and started to strike, he would operate out of Butler, or if that wasn't ready, he could operate out of any other branch.

It was costing the Company too much money in making its own deliveries; an outside firm could do it for less.

Virginia Stys stated she wanted to ensure that she would be reviewed for her yearly raise, due in November. Werner said "he couldn't give raises now, because of this union business, and because of this, a lot of people who would have been reviewed, weren't . . . ." After the union business was over, he would review these people who had not received raises and go back to the same policy as before. However, at such time no raises would be granted retroactively. Questioned as to why an employee did not receive her raise after one year and why the annual raises had not been given automatically, he replied, in part, that perhaps they were overlooked. He indicated wage reviews are due a year from the last raise. He could not give raises at this time because it might be considered bribery. Instead of asking about raises, they should be thinking of a cut. At another point, he said that the only way he could give raises was if everybody worked hard and sales went up.

Werner said he would check on questions concerning health insurance—which was the subject of some discussion.

The October 26 meeting[21]

Werner had specific information on health insurance, which he explained by using the blackboard. The insurance company had been reviewing the current policy and indicated there would be changes and a higher premium for the Company. These changes had been under negotiation for some months, since March or April. He

[21]Insofar as the statements are not essentially repetitious of those described as to October 14.

announced that an improvement in benefits[22] would be put into effect as of November 1.

The cardex girls would be laid off in about a month (upon conversion of this operation into the existing computer system, as had been discussed with the employees for a long period).

At Allen-Bradley, the strikers had a rough time and received no strike benefits. The Union had not told the employees there would be no strike benefits. The dues for union members at General Motors were raised $10 a month to support the strikers, and that might happen to Respondent's employees.

Nine times out of ten when there is a strike, the union brings in outsiders on the picket line. If there is a strike, the employees trying to get to work would be subjected to verbal and physical abuse.

Werner was asked why Behling received onl 15 minutes' notice of her termination.[23] He said her supervisor complained that they had trouble with her.

The money that was in profit sharing belonged to the employees, but if the Union got in, it would be different, according to what the Union stated.

This was not a very reputable union. Why not another one? "Why the UE?"

Asked if he would negotiate reasonably with the Union, he said it depended on what was meant by reasonably.

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[22] Principally, the hospital room coverage would be increased from $20 to $40 per day, and the maximum major medical would be raised from $10,000 to $15,000. Around December, the employees received a pamphlet (in evidence) showing the insurance changes.

[23] Other cardex employees, terminated about December 24, were given one week's notice and severance pay.

The November 3 meeting[24]

Two high officials of the International Union had once been tried for being Communists; the charges were never proven and were dropped; the same two men are still the head men of the U.E.

Although the witness was not sure where Werner specifically mentioned the Machinists,[25] he did say the other union was a stronger and better union.

If the employees would stick with him, they could do better; and if the economy got better, they would all get a raise.

If there was a strike, he could hire other people to come in and take over their jobs.

Werner's testimony

On October 14, he did not have the answers to questions about insurance, and so he said he would have to check with the insurance company. There were many questions about strikes. He answered that only the Union would force a strike. On being questioned, he told them about the union shop and discharge for failure to pay dues. As to union demands, he said he could not reply because he did not know what these would be. The Butler branch was mentioned in every meeting. It had been discessed for 7 or 8 months. He was attempting to get a location there to protect his customers with better service. If there was a strike, he would continue to operate at Milwaukee, Butler, and all other branches.

About raises, it was explained that a raise is given after a 90-day probationary period, and then a year from

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[24] Insofar as the statements are not essentially repetitious of those described as to October 14 and 26.

[25] The Machinists initially intervened in the representation cases, but on October 21 it was permitted to withdraw prior to the election.

that time; pay status would then be automatically reviewed. In some cases, employees got raises before the year was up. He told the employees that, if the economy permits and "when he is legally able," he would review the records and make promises as to whether a raise would be given. He denied that he asked, "Why the UE?" He told them he didn't think the U.E. had sufficient experience in office and clerical type work to be able to come into this plant. On cross-examination, he admitted that he possibly said, "Why this union," He read them a newspaper article about Allen-Bradley where employees voted to reduce their hours rather than take a layoff. This answered a question whether there would be layoffs if the Union got in. He promised the cardex girls in one of the speeches that they would be given a week's termination notice and severance pay, but he does not know about Behling.

The foregoing is substantially the testimony of Werner on the speeches. Three other witnesses testified for Respondent, as already described. McClure's entire testimony on this subject was that Werner said he would hate to see a strike if he could not meet the demands, of which he knew nothing about. Travert attended the meetings, but could not recall anything of substance. Rocklin testified that, at the first meeting, Werner told them that if they had any question about raises they could visit him in his office. At the last speech, on November 11, he answered a question about raises, stating that employees would have to wait until this was all over. As set forth above, the General Counsel's testimony is credited.

Concluding findings on the speeches

Werner was entitled to appraise the employees of the facts, as he contended, and even if they were not the facts, his statements were privileged to the extent that they were not directly or impliedly coercive. However,

albeit with the presence of counsel, he launched upon a rather uninhibited and wide open course of speeches and, at the least, he assumed the risk of conveying his remarks in a manner that the employees could reasonably construe as coercive. This risk is especially pronounced in circumstances as present here, where employees were addressed in a compelled audience; union animus was the unmistakable theme; the employees were relatively unsophisticated in this type of organizational conflict; they were with justification sensitive as to their job security and wages in view of recent layoffs and withholding of wage reviews; and the vantage of superior knowledge lay with the Company, as well as the real control over employment conditions.

In the recent Gissel case,[26] the Supreme Court specifically addressed itself to the long controversial question of speech within the purview of the Act, such as those made here, during a "nascent union organizational drive, where employers must be careful in waging their anti union campaign." Standards were articulated by which it may be determined whether a "company prediction of the possible effects of unionization is proper and permissible,"[27] bearing in mind the constitutional guarantees written into Section 8(c) of the Act.

> . . . Thus, an employer's right cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of

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[26] N.L.R.B. v. Gissel Packing Co., 395 U.S. 595 (1969)

[27] N.L.R.B. v. Varo, Inc. 425, F.2d 293, 300 (C.A. 5); and see,
N.L.R.B. v. Lenkurt Electric Company, Inc., 76 LRRM 2625 (C.A. 9—February 10, 1971); Bancroft Mfg. Co., 189 NLRB No. 90.

the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear . . . .

. . . an employer is free to communicate to his employees any of his general views about unionization or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without protection of the First Amendment. * * *

Applying the standards of the Gissel case, as well as viable Board precedents, I find there were numerous and repeated predictions by General Manager Werner, made to the employees in an aura of virulent union hostility, which were not "demonstrably probable consequences beyond his control" and based on objective facts, but rather were threats of retaliation based on misrepresentation and coercion. In the entire context of the litigated speeches within the embrace of the complaint, the following statements amount to coercion or other interference violative of Section 8(a)(1):

(1) The predicted inability to meet the Union's demands, which were then unknown to Respondent, would

result in loss of customers, layoffs, possible plant closure, and bankruptcy.[28]

(2) The repeated emphasis on union-forced strikes as an inevitable consequence of unionization,[29] with the resultant loss of customers and eventual bankruptcy.

(3) The constant reference to opening a nearby branch in Butler, with six branches, already existing, could only have been intended, and could reasonably have been understood by employees, to discourage union support. Used in various ways, it forecast the complete futility of a strike, as Respondent would remove the struck operations to Butler and other branches impliedly on an indefinite basis; it also held out inducements of job opportunities or transfers instead of a layoff, as an implied reward for taking the side of Respondent against the Union.

(4) If the employees would stick with him (and reject the Union), they could do better; if the economy got better, they would all get raises.

(5) In the event of a strike, employees seeking to cross the picket line would be subjected to verbal and physical abuse at the hands of the Union.

(6) The Union is not suitable or competent to represent the employees; it is not a reputable organization, still having high international officials who were notoriously involved in court cases as alleged Communists; and in this context, Respondent suggested another union, such as the Machinists, with the purpose of diverting the employees from the U.E. The violations consist of

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[28] There is nothing to demonstrate that the Union's as yet unannounced demands would substantially enhance the Company's costs, or that the Company "could not, in fact, meet higher labor costs out of current levels of income, or out of increased income, or from reduced costs in other areas." Mon River Towing, Inc. v. N.L.R.B., 421 F.2d 1, 11 (C.A. 3)

[29] See Tommy's Spanish Foods, Inc., 187 NLRB No. 31.

a breach of required neutrality, and interference with the guaranteed right to employees to a free choice of representative.[30]

(7) With the Union, there would be a "wall" between Werner and the employees, as they could no longer deal directly with Respondent concerning their problems and grievances.[31]

(8) Raises were withheld and could not be given now because of "this union business." The issues concerning raises will be further discussed infra.

(9) Predicting that selection of the Union would only result in "harm."[32]

While Werner's discoursing on the operation of a union shop and checkoff confused some of the employees, who construed the statements as automatically requiring membership and payment of dues at the peril of their jobs, I am satisfied that Attorney Clifford's intercession with explanations of these technical subjects was probably sufficient to remove any implication of coercion. Similarly, as to the permanent replacement of strikers, while the manner it was explained to employees may have been less than complete and clear, the November 11 speech refers specifically to an economic strike. I find no violation.[33] Other subjects covered in the speeches, e.g., health insurance and comments relating to the layoffs, are separately treated below.

E. Wage Increases

In their hiring interviews, and in their general employment, employees were led to expect annual wage

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[30] E.g., Newburgh Steel Company, et al., 146 NLRB 1101. Standing alone, the labeling of union leaders as "Communists" is privileged. E.g., Globe Wireless, Ltd., 88 NLRB 1262, 1263.

[31] Proviso to Section 9(a) of the Act.

[32] Block-Southland Sportswear, Inc. 170 NLRB No. 101.

[33] Cf. Tommy's Spanish Foods, 187 NLRB No. 31.

increments. The evidence clearly indicates the practice of granting annual wage reviews as to each employee one year after the last raise. Werner explained that annual increases were not as such automatically granted. However, I find there was in effect a typical program of annual merit increases, in the respect that upon the wage review, absent adverse factors in the employee's performance, the increase would be granted. Thus, Respondent's established practice constituted an existing term of employment, regularly expected by the employees as a form of compensation.

Following the Union's advent, these wage reviews were admittedly withheld from a large number,[34] but not all, of the employees,—because of "this union business" and to avoid the charge of bribery. Without more, it may be found that such a withholding was unlawful.[35] Additionally, the evidence well reveals that Respondent exploited the sensitive question of wage increases to its advantage during Werner's anti union speeches and in the pre-election campaign.

At the November 3 speech, John Hopple had asked a question concerning wages and was afterwards summoned to Werner's office. In the presence of other supervisors, he was handed a memorandum[36] in which he was granted an hourly increase of 15 cents.[37] Werner told him that, while about 19 other employees were waiting or qualified for wages, he was one of the "chosen few" because it was thought he could do something for

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[34] Werner estimated "safely" that the figure was between 10 and 19 employees.

[35] E.g., The Gates Rubber Company, 182 NLRB No. 15. And see The Udylite Corporation, 183 NLRB No. 23, at p. 15 of TXD.

[36] Dated prior to November 3.

[37] He had previously received a 15 cent raise on September 28, apparently as a result of an annual wage review.

the Company. I am unable to accept Werner's asserted justification for this exception, which was predicated on his subjective judgment that Hopple, like a few others, was a hardship case because he had a "new baby" in the family.[38] The position of Werner that the annual wage reviews were in effect precluded by the pending election proceeding is rejected as without merit in law, as not advanced to the employees in good faith, and as discriminatorily applied. The employees could reasonably infer from the discriminatory applications that Respondent's purpose was to discourage their support of the Union. Violation of Section 8(a)(1) is found as to those employees who were dispartately granted raises, and as to those employees who were denied annual wage reviews were due following at least Respondent's receipt of the Union's recognition demand.

F. The Layoffs

Schaetzel and Fields

On Monday morning, August 24, Supervisor Joyce told Schaetzel that Werner had instructed him to lay off employees in the warehouse, and that Schaetzel might be laid off because of his attendance record. Schaetzel said he was ill and received permission from Joyce to leave work. The next day, when he reported for duty, he was told by Michael Klaus to go home and not return.[39] Since Schaetzel was hired in July 1969, Respondent knew he was a diabetic and needed regular insulin treatment. Joyce was aware of the problem and was

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[38] Werner indicated 2 or 3 others were given raises about the same time on similar hardship grounds, including Strzyzewski, and that, since August, there have been 3, 4 or 5 raises. Records in evidence show that during this period in question raises were given to 12 employees, of which 7 were granted on October 19; some were within the year, and some were annual.

[39] Joyce was away from the plant, and Klaus was acting as "leadman" in charge of the warehouse section. Klaus was then replacing Lorraine Eggleston while she was on summer vacation for 2 months.

admittedly "not too disturbed" at times when Schaetzel failed to call in his absence. Other employees had numerous absences. Werner conceded that it is not the actual number but the reason for the absence, such illness, which is controlling.[40] This ground loses further credence by virtue of the evidence that Schaetzel was awarded an extra pay raise in December 1969, and told by Joyce it was because of superior work performance.[41]

Joyce testified that a meeting of supervisors was held on August 17,[42] at which time Werner decided, for economic reasons, to lay off one employee from each department in accordance with seniority.[43] This osten-

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[40] Leroy Orchekowski also had a poor attendance record, and had absences from work occasioned by a drinking problem, known to Respondent.

[41] Joyce professed a lack of knowledge of the raise, while Werner admitted it was approved by him.

[42] Carpenter's version on direct was that Werner first discussed economy measures the first week in August, and names of employees may have been mentioned. On cross, he stated that the first time Werner talked to him about cutting down overhead was in June, maybe. During the first week in August, it was definitely decided to cut down. Then he said, about August 15 or 16, at a supervisor's meeting, instructions were given to lay off specific employees, i.e., Schaetzel, Fields and Neary. Werner testified that the supervisors meeting took place the first week in August, and that there were many discussions with individual supervisors in the preceding weeks. Joyce disavowed his pretrial statement to a Board agent; confronted, he admitted portions which conflicted with his testimony. Elaine Klenz, office manager, who was named as also present at the supervisors meeting, was not questioned on this subject. Assertedly, Eggleston was also consulted by Werner about the same time concerning the numbers of drivers she needed for deliveries; she was not called to testify.

[43] The general policy for these layoffs was described by Werner as based on departmental seniority. In Respondent's testimony, it is obscure as to what constitutes a department for such purposes.

sibly firm decision on August 17, or earlier, to lay off particular employees was not carried out until August 24 as to Schaetzel, Fields and Neary, and not until August 28, as to Klaus. Questioned on cross-examination, Werner gave vague reasons. Joyce said there was a need for personnel at that time to take the annual inventory, usually done the weekend before Labor Day, but he wanted to accomplish as much work as possible before that time.[44]

As previously described, the machine shop consisted of three full time employees, three regular part time employees, and two "on call" employees. When Fields was laid off by Joyce on August 24, he was informed that his selection was not according to seniority but because he had less on-the-job experience than Matajac.[45] He was told the Company could not afford his wages, and that the part timers would also have to be let go. Describing Fields as a trainee, and Matajac as having previous shop employment,[46] Werner indicated that in laying off Fields seniority was followed within the trainee category. As further revealed infra, there are many inconsistencies in Respondent's application of its stated policy of following departmental seniority regarding the layoffs, and I find this defense entirely dubious on the evidence. Werner sought to provide an additional ground for the layoffs in the machine shop. Originally he had set up the machine shop in Milwaukee by employing only part time retired machinists "on call." Since April or May, he talked to Joyce many times and "instructed" him to go back to the old system. He

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[44] There is a complete absence of corroboration from any of the numerous witnesses that inventory work was performed by the employees in question, or the general help, during August.

[45] Matajac was hired after Fields.

[46] Both answered Respondent's advertisement for machinist trainees; Fields was hired at $2.10 and Matajac at $3.25 an hour.

stated that Joyce replied he would do this on an attrition basis, (Werner) adding that there have been no hires in the machine shop since April or May.[47] Fields and Matajac were hired in May; and after Fields was laid off, Strzyzewski was transferred as a full time employee from the warehouse to the machine shop. As of the hearing, the machine shop was operating with the same number and type of personnel as before, less one full time employee. I find this aspect of the defense unsubstantiated, conflicting in the specific evidence, and implausible.[48]

According to Werner, all decisions were made by him alone to effect various economy measures necessitated by a serious downturn in business (a "tailspin"). Having at first testified that he did not consult any superior concerning the "termination" of employees, he was shown his pretrial statement taken by a Board agent. He confirmed as correct that—"about two and a half months ago Mr. Berry came here and we reached the decision that we would have to reduce our payroll immediately." Explaining further, he said that Berry merely indicated profits were down and told him to use his judgment on how to remedy the situation. He testified that he has no access to reports on Company profits, but is only told generally when they are up or down. From an account of shipments and orders, he can only make an estimate of monthly sales toward the end of each month. After the close of the hearing, an affidavit

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[47] Joyce called this a "pet peeve" of Werner, dating back 5 or 6 years. Joyce himself wanted full time people, and not so many wondering when they are coming in. Later, he testified that he has Werner convinced he will always be able to keep one full time employee, but the rest he wants on part time. As will be shown, this does not accord with the actual machine shop complement at the time of the hearing.

[48] Credibility also enters into this opinion, as Werner's testimony generally impressed me as unreliable.

was received[49] purporting to show official information on Respondent's sales and profits for the past 5 years covering the consolidated operations at Milwaukee and the branches. Werner testified that a breakdown as to Milwaukee alone was not available. The figures below, taken from the affidavit, reflect annual fiscal periods ending August 31:

Year	Sales	Net Profits
1966	$7,348,769	$130,350
1967	7,574,526	173,576
1968	7,603,961	170,586
1969	9,013,597	178,543
1970	9,357,887	105,872

Thus, it is noted that sales were up in 1970. And monthly sales were ostensibly the main information accessible to Werner when the layoffs in question were effected,[50] while he had only been generally advised by Berry that profits were down. Werner testified that, in the last 10 years, the Company has grown at an "exceptional rate."

During this same period, there were no layoffs in any of the branches.[51] And there have been no prior layoffs

[49] The affidavit was not admitted in evidence. It was included by the reporter in the exhibit file as General Counsel No. 25, which was identified, but not offered, as Werner's notes of a telephone conversation concerning this information. Werner testified as to the same data he was given on the telephone. The affidavit was presumably intended to be furnished in response to the General Counsel's subpoena, served January 5. The affiant, however, was not presented to testify.

[50] The following are comparative sales figures for Milwaukee and branches for particular months:

	June	July	August	September
1969—	$801,000	785,000	678,000	711,000
1970—	767,000	759,000	668,000	699,000

[51] However, there were two hires in Racine, in November and December, one hire in Wausau, in October, and one hire in Green Bay, in December. The branches have 50-60 employees combined.

in the history of the entire Company. Since the various layoffs in question, Respondent re-employed a veteran returning from military service and assigned him to the warehouse, but it has done no further hiring. Some employees have been transferred between departments. The employees had regularly worked, at their option, at least 5 hours of overtime per week; such overtime work continued after the layoffs. In 1970, Respondent contributed $50,000 into the profit-sharing fund, as it had in prior years, although there is specific provision for a reduction in contribution "if earnings for any fiscal year are reduced . . . ."

Schaetzel and Fields were leading organizers of the union movement, which took concrete form on August 17. Following this date, employees were solicited in the plant to attend the initial union meeting on August 20, and to sign authorization cards. Joyce was not unaware of these activities, as he claimed, but engaged in interrogations beginning at least August 21, supra. On Saturday, August 22, he visited Meier's house and sought confirmation of the identity of the instigators, who he thought were Schaetzel and Fields. The next working day, they were laid off, together with Barbara Neary. These, as well as the other alleged discriminatees, were severed without notice in the middle of a payroll period. And that week preceded the annual inventory in which all employees are normally utilized and work substantial amounts of additional overtime. Thus, the timing is significant,—though purportedly the decision had earlier been made and action withheld until August 24. Respondent's antipathy toward the Union is well documented. As above described, and I find, the various economic grounds it advanced are seriously flawed. In particular, I am unable to credit the testimony that a decision to lay off specific employees had been made on or before August 17. Rather, I find that these decisions must have been reached only after Respondent's knowledge of the Union's campaign. While it is unquestionably an independent business judgment at any time as

to whether economic conditions require personnel reductions, the sales and profit data supplied do not on their face compellingly support Respondent's contention here. On this entire record, it is concluded that Schaetzel and Fields were discriminatorily selected for layoff, although actually intended to be terminated. Accordingly, these alleged violations of Section 8(a)(3) are sustained.

Neary and Klaus

Barbara Neary was also laid off on August 24, and Michael Klaus on August 28. Neary was employed in expediting, which is part of the purchasing department. Supervisor Carpenter testified she was specifically named at the supervisors meeting with Werner as the least senior employee,—presumably of the expediting section. She did not sign an authorization card.

Klaus was not mentioned in the testimony concerning the supervisors meeting. At the time of his layoff, he was acting in charge of the warehouse section in place of Eggleston, on a two-month summer vacation, supra. He signed a card, attended the original organizational meeting at the union hall on August 20, and was among those interrogated by Joyce. Although laid off on August 28, the parties agreed that he is in the unit for the purpose of deciding the question of the Union's card majority. He worked as a stock clerk in the warehouse when he was not substituting for Eggleston. Concerning Klaus, Werner gave the reason for his layoff that he was a student who would return to school and that his future status with the Company was uncertain.[52]

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[52] The record is ambiguous as to Klaus' employment status. He appears on an attendance record as having commenced full time work on June 1, 1970, as a temporary stock clerk. Another record shows that he was given an hourly rate of $1.65 on July 5, 1967, and $2.00 on June 3, 1969. It is not alleged or otherwise shown that he was only a summer employee during school recess, or whether he had worked part time during the

Thus, Klaus' selection appears also to be a departure from the seniority standard avowedly employed in the layoffs. With Klaus, there is a sufficient basis for an inference, which I draw, that Respondent was aware or suspected his active participation in the Union, and that this was the true motive for his severance.

General Counsel contends that Neary was chosen in order to camouflage the termination of the known union activists.[53] The inclusion of Neary with the layoffs of Schaetzel, Fields and Klaus at essentially the same time lends some substance to this contention.

While Werner gave testimony that he had earlier undertaken certain cost cutting measures,[54] it is my finding, as noted, that the adoption of a plan to reduce the personnel was conceived only after the Union's appearance on the scene. It is significant that there were no prior layoffs in the Company's history; that the six branches, involved in the same financial circumstances but not organized by the Union, were not subjected to any layoffs; and that the testimonial account of the layoff decisions is grossly conflicting and unconvincing. As to Neary as well, it may be found that the General Counsel made out a prima facie case which was not overcome by Respondent's evidence. Accordingly, I conclude that Respondent violated Section 8(a)(3) as to Klaus and Neary.

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[52] (Continued)
remainder of the year. It is clear that he did not leave voluntarily on August 28. If it is assumed he was just a summer employee, the additional period he normally would have worked is indeterminate on this record, but could conceivably have continued for another month.

[53] In his brief, the General Counsel offers the same reasoning as to Klaus, Morris and Eisch.

[54] The economies effected before August 17, as related by Werner, appear to me as "attempted makeweights" and of minor consequence to the issues herein.

Matajac

The second group of layoffs took place September 23 as to Matajac, Morris, Eisch, and Behling.[55] Matajac has previously been shown as one of the original promoters of the Union, and to have engaged in all the initial activities. On August 28, he was interrogated by Joyce and threatened with reprisal. ("I'll remember you, John.") because Joyce believed he would suffer adversity with the Union. On September 21, Matajac, Schaetzel and Bussard came to testify in the representation hearing at the Board office. Passing them in the hallway, Werner called them "son of a bitches." On September 22, he was notified by Joyce that he was laid off, on the basis that he had the least seniority in the machine shop.

As to Fields, a trainee, it is recalled that Respondent argued that Matajac, though junior, was retained in the earlier layoffs because he had on-the-job experience. In this instance, Martin, a trainee, was retained, while Matajac was selected as having the least seniority in the shop. Joyce testified that he was not consulted as to Matajac, Morris and Eisch, and that he was instructed by Werner on September 23 to lay these employees off. Werner testified the second "group of terminations" were accomplished the same way as the first, and they were discussed a week to 10 days in advance.

My finding as to Matajac is that he was terminated because of his known union activity in violation of Section 8(a)(3).

Behling

As earlier described, Cynthia Behling was an active organizer, and had solicited authorization cards of the

[55] No particular reasoning was offered by Respondent for the timing of these further layoffs, following one month after the first group, in terms of additional evidence of adverse business conditions.

girls in the cardex and expediting sections. On September 23, when Supervisor Carpenter advised her she was laid off, he said that the selection was made by seniority in cardex, and if it were not for the Union,—"they could pick and choose who they wanted to lay off." At the same time, he told her that she would be replaced by Anne Howard, who had been reduced from expediting as the employee with the least seniority in that section. April Glatch, called as Respondent's witness, testified that, on September 23, she and Patricia Spinella were asked by Carpenter to train Howard in Behling's job. He also told them Behling would be recalled.

This presents a further confusion in Respondent's declared policy as to its basis in effecting all these layoffs. It would appear to make little sense to select one junior employee from each "department," and then allow such "bumping" between two distinct groups. However, this procedure was apparently used only in Howard's case, and was not offered or contemplated as to the alleged discriminatees here.[56] The entire cardex section was expected to be eliminated within a short time; in fact all the cardex employees were terminated at the end of the year, with one week's notice and severance pay. Behling was given no notice or severance pay. Werner, when asked at the November 3 meeting, said that her supervisor had trouble with her. Carpenter testified, on cross-examination, that Behling's name was first brought up the second week in September.[57] Taking Carpenter's version, or Werner's, it lacks plausibility that action was delayed for so long after the decision had been made.

On all the record evidence, I can only conclude that Behling's layoff falls in the same category as that of

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[56] Neary had earlier been laid off from expediting, on August 24, supra.

[57] On direct, he said he determined seniority as to Behling on August 15 or 16, when he told this to Werner, with Joyce and Klenz present.

Matajac, Schaetzel and Fields. She solicited a large number of employees in the plant for authorization cards. Respondent engaged in a course of interrogation intent upon learning the identity of the instigators. And Behling received disparate treatment as to notice and severance pay. Consequently, I find that she was terminated, in whole or in substantial part, because Respondent believed or suspected she was especially active on behalf of the Union.

Morris and Eisch

Both were in the delivery section of the warehouse as truck-drivers. Morris signed a card at the first union meeting on August 20, and Eisch signed the next day. It is observed that there is a disproportion of seven out of eight employees selected for layoff who were card signatories.[58] Werner testified that, in late July or early August, he raised a question as to why there were seven drivers and only five trucks. He asked for a study on the drivers, and found that it cost Respondent $1.26 to make a delivery stop, while commercial delivery (e.g., United Parcel Service) could be bought for $.90 a stop.[59] In early August, he reduced the drivers from seven to five,—but he is not sure whether both these drivers were "let go by attrition" or one was transferred to another department. But it is noted that Morris was hired on July 14,[60] and Eisch on August 12,—the latter being urgently sought by Joyce over several weeks. Applying Respondent's layoff policy, here there were two junior employees, not one, selected for layoff on September 23 from a group of five drivers. The testimony shows that,

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[58] E.g., Starlight Mfg. Co., 172 NLRB No. 21.

[59] In his speech on October 14, he made it a point that it was costing the Company too much money for the deliveries, and an outside firm could do it for less.

[60] Another driver, Nancy Gauger, was hired on July 15. Her attendance record shows termination about August 28; Joyce implied that she quit.

after they were laid off, a heavier burden fell on the remaining drivers, now assisted by Eggleston, to wrap packages for delivery, including those for United Parcel Service. It appears to me that Respondent already knew or could easily have ascertained at an earlier time the same relative cost factors in making deliveries. After the Union appeared, a decision was made to contract out a greater percentage of deliveries to an outside firm. This was the basis, I find, for reducing Morris and Eisch. On Werner's account of the affair, he could just as readily have achieved this economy in late July or early August, or perhaps contracted out the entire operation then. So far as it affects Morris and Eisch, this decision, in effect to contract out part of the operation, must be regarded as having been precipitated by the same animus and motive of discouraging union activity. Accordingly, it is held that these two employees as well were discriminatorily terminated within Section 8(a)(3).

G. James Bussard

In the absence of evidence, the allegation that, about August 26, Bussard was transferred to a less desirable job, is dismissed.

H. The Refusal to Bargain

The appropriate unit consists of all employees at the Milwaukee plant, including office clerical employees, but excluding outside-service salesmen, together with the customary exclusions. The parties herein stipulated that there were at least 79 employees in the unit, as specified on an exhibit, as of "the demand-refusal dates." As shown, Respondent's letter refusing the Union's recognition demand was written on September 4. Remaining in dispute are 12 named individuals, viz:

Schaetzel, Fields and Neary, who were found to have been unlawfully terminated, are included in the unit. McGill, Murphy and Gumm, as regular part-time employees in the machine shop, have a substantial and

continuing interest in the employment conditions at the plant, and are therefore included.[61] Fritchel and Knitchek are "on call" part-time employees in the machine shop, i.e., they are called to work only when needed by Respondent.[62] The average number of hours per week they worked in this capacity has not been shown in evidence. As, inter alia, there is no basis for finding they are regular part-time employees, they are excluded as intermittent and casual employees. Eggleston, as testified, is "in charge" of the warehouse section, including the wrapping and delivery functions. Werner stated that she was consulted early in August concerning the number of employees under her charge who would be needed. Joyce has overall supervision of the warehouse section, as well as the machine shop, and has additional responsibilities, such as visiting and servicing customers about 25 percent of his time. Werner testified he has given Joyce specific instructions that, when he will be gone from the plant, to advise Werner's assistant, Harry Gaffney, to make himself present at the warehouse "often enough" to see that things are running smoothly. On this record as litigated, it is reasonably inferable that, for substantial periods each week, Eggleston is solely in charge of the warehouse personnel,[63] and that, in general, she responsibly directs employees within the supervisory definition of Section 2(11). Dennis Helwig was hired on July 28, 1969, as a "sales trainee" and has been in training to become an outside salesman. He is on a straight salary of $145 or $150 a week, does not punch a timeclock, has a desk in the "salesmen's

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[61] E.g., Red & White Super Markets, 172 NLRB No. 210.

[62] From the general references in the record to Respondent's use of this type of employee, it would appear that they are social security annuitants.

[63] For example, compare the authority exercised by Michael Klaus, in Eggleston's absence during the summer, when he ordered Schaetzel to go home and not return.

room," and his name is on the "in and out chart" at the switchboard.[64] Schaetzel testified that Helwig told him he would be learning the job of outside salesman for approximately a year and then would go out on the road.[65] Werner testified that some of the sales trainees qualified to become outside salesmen in 6 months; others have taken a year or two. It seems highly probable that, in the regular course of events, Helwig will assume the position of outside salesman within a short period following the hearing. As he was specifically employed to train for such a position outside the appropriate unit, Helwig is excluded.[66] Mazurek was formerly a full-time salesman for respondent and Behl was a full-time telephone salesman. They are now employed part-time on salary as retirees under social security. Both have desks and telephones in the salesmen's room, and are on the "in and out chart." Mazurek is the only person who works "on the catalogues." He is employed for only 3 hours in the morning for 3 days a week, and is compensated on the basis of $3.50 an hour. Behl still does telephone sales work about 32 hours a week, and is paid the top rate of $3.75 an hour. About 10 to 12 percent of Behl's time is spent at the branches substituting for employees who are ill or on vacation. Other telephone salesmen are included in the unit. Presumably, he is on the "in and out chart" because he visits

[64] The "in and out chart" is maintained for certain personnel who have occasion to leave the plant. The follow-in are the names regularly kept on the chart: Werner, Joyce, Carpenter and Supervisor Fred Odell; Ralph Holsen and Herb Holsen, outside salesmen; Sigmund Mazurek and Erwin Behl, whose status is in dispute; and Helwig.

[65] Earlier in the hearing, the Trial Examiner inquired whether Helwig and Behl would appear as witnesses, and Respondent's counsel indicated that they would. They were not called.

[66] Garrett Supply Co., 165 NLRB 561.

the branches to perform telephone sales work. As a regular part-time employee in such classification, I find no basis for excluding Behl. However, Mazurek works only 9 hours a week, is identified with his prior capacity as an outside salesman for a long period of employment, and is unique in his job on the catalogues. Mazurek is therefore excluded as lacking a sufficient community of interest with the unit employees. In sum, of the 12 disputed individuals, 7 are included in the unit, and 5 are excluded.

As I find, there were 86 employees in the unit as of September 4. Signed authorization cards from 54 employees in the unit were admitted in evidence, without challenge. Of these, 45 were signed on dates from August 20 through August 31. Additional cards were signed by 6 employees on September 9 and 10, and the remaining 3 cards were signed on November 4, 5 and 6. Thus, the Union had a clear majority of cards when it was refused recognition, and it augmented this majority in subsequent weeks while its recognition demand was continuing. It is accordingly held that, on and since September 4, the Union has been, and is now, the statutory bargaining representative of the employees in the appropriate unit.

As detailed herein, Respondent engaged in serious violations of Section 8(a)(1) and (3), which were calculated to defeat the Union's organizational effort and undermine its representation status among the employees.[67]

These unfair labor practices, in my opinion, were of a character and scope which may properly be described as "outrageous" and "pervasive" within the terminology of the Gissel case. The effects of such conduct were to preclude a fair representation test in the election held

[67] All the cards were signed prior to the election on November 12, and preceding or during the course of Respondent's coercive conduct.

on November 12,[68] and they also render highly improbable the holding of a new or rerun election without the continuing impact and recurrence of Respondent's coercion. In these circumstances, the use of traditional remedies is ineffectual, and consideration is validly given to the signed authorization cards as a more reliable measure of the employees' representation desires. It is therefore concluded that, by refusing the Union's bargaining request and engaging in the aforesaid unfair labor practices, Respondent violated Section 8(a)(5), and that a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and otherwise remedy the extensive violations committed.[69]

I. Health Insurance

At the meeting with employees on October 14, Werner stated that he did not know the answers to questions raised concerning the insurance, and he would "check" on the matter. Thereafter, he called Respondent's controller, Robert Province, and was told that, following the expiration (and renewal) of the yearly policy in April, negotiations were undertaken because the insurance company wanted the premiums raised and Respondent also desired some changes. It was expected that the revised

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[68] As noted in the election, as against the 54 signed cards, the Union received 37 votes; there were also 4 challenges by Respondent, and 3 by the Union. The effect of Respondent's coercion is thus presumptively evident. The coercion involved is of such a serious nature that it is well nigh impossible to conjecture the time span before the impact could be considered as dissipated. Moreover, it is reasonable to assume on the present facts that the effect of any added delay would serve only to profit Respondent for its wrong doing and further deprive the employees of the representation to which they are entitled. Cf. New Alaska Development Corp. v. N.L.R.B., 76 LRRM 2689 (C.A. 7 - March 9, 1971).

[69] N.L.R.B. v. Gissel Packing Company, 395 U.S. 575.

policy would be consummated sometime in November.[70] On July 21, the insurance agent sent an initial letter to Province indicating some increased trends in Respondent's experience of claims made under the policy and inviting discussion of possible revisions in the program. During early August, the insurance agent conferred with Province and they agreed to the terms of a new policy, with higher premiums and a changed benefit structure.[71] The policy was applied, effective November 1, to all four of the Berry companies.

General Counsel alleges a violation of Section 8(a)(5), in that Respondent acted unilaterally in changing the insurance benefits without bargaining with the Union. While Werner in his speeches clearly capitalized upon the acquired information to influence the employees against the Union, I find that Respondent had already entered upon the course of making such changes and had effectively committed itself with the insurance company prior to the Union's advent and claim of majority representation. Accordingly, this allegation is dismissed.

J. The Representation Cases

The consolidated proceeding is prosecuted with the principal objective of having the election set aside and obtaining a Gissel bargaining order. The evidence fully warrants such a result. Additionally, the issue of the challenges were referred to me by the Regional Director. In effect, these issues are resolved in the disposition above of the questions concerning the inclusion of the same challenged individuals, among others, in the appropriate unit. Assuming that the ballots of the five

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[70] He also testified that, about September 10, he received notice that the new policy, with improved benefits, was effective as of November 1. It is observed that Werner did not have the answers on October 14.

[71] Essentially as described in footnote 22.

challenges, which would be overruled,[72] are opened and counted, and that the Union loses the election, it would nevertheless be entitled to the bargaining order under well established law. It is clear that if these five challenged ballots were all in favor of the Union, the results would show that, of 84 eligible voters,[73] the Union would receive 42 votes, or less than a majority. As no useful purpose would be served in specifically dealing with the challenges, I will recommend that the election be set aside and the petitions in the representation cases be dismissed.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. A broad cease and desist order appears warranted, particularly in view of Respondent's discriminatory conduct and other violations.[74]

It has been found that Respondent unlawfully terminated eight employees, on August 24, August 28 and September 23. It will therefore be recommended that Respon-

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[72] I.e., Schaetzel, Fields, Matajac, Behling and Behl.

[73] The original 86 eligibles, less Mazurek and Helwig.

[74] N.L.R.B. v. Express Publishing Company, 312 U.S. 426; N.L.R.B. v. Entwistle Mfg. Co., 120 F. 2d 532 (C.A. 4.)

dent offer these employees immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, by payment to them of a sum equal to that which they would normally have earned, absent the discrimination, from the date of the discrimination to the date of Respondent's offer of reinstatement,[75] less net earning during such period, with backpay computed on a quarterly basis in the manner established in F. W. Woolworth Company, 90 NLRB 289. Backpay shall carry interest at the rate of 6 percent per annum, as set forth in Isis Plumbing & Heating Co., 138 NLRB 716. It will be further recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay and the rights of reinstatement under the terms of these recommendations.

Upon the foregoing findings of fact, and upon the entire record in the cases, I make the following:

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating on August 24, August 28 and September 23, 1970, the eight employees named below, there-

[75] The status of Klaus, as possibly a temporary summer employee, shall be determined in the compliance stage of this proceeding. If it is so determined, backpay shall be limited accordingly, and reinstatement shall be offered only to the same kind of temporary employment he had in the past.

by discouraging membership in the Union. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

John Schaetzel	Arlene Eisch
Roger Fields	John Matajac
Barbara Neary	Linda Morris
Michael Klaus	Cynthia Behling

4. All employees of Respondent at its Milwaukee, Wisconsin, facility, including office clerical employees, but excluding outside sales-servicemen, professional employees, managerial employees, confidential employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Since September 4, 1970, the Union has been, and is now, the exclusive representative of all employees in the appropriate unit within the meaning of Section 9(a) of the Act.

6. By failing and refusing, at all times on or after September 4, 1970, to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the foregoing, and by other acts and conduct interfering with, restraining and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent's unlawful conduct interfered with the election held on November 12, 1970.

Upon the above findings of fact, conclusions of law, and the entire record in the cases, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[76]

Respondent, Wisconsin Bearing Company, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and those of fellow employees; coercively promising and granting wage increases or other benefits to employees; withholding wage reviews and increases from employees to discourage union support; urging employees to select a union other than the union they have freely chosen; stating, in the presence of employees, that employees who have a union in mind will not be hired; stating that, with a union, employees could no longer deal directly with Respondent concerning their problems and grievances; or engaging in surveillance of union meetings or activities.

(b) Threatening employees with closing the machine shop, closing the plant, loss of customers, layoffs, discharge, loss of jobs, bankruptcy, "harm," the inevitability of a union-forced strike, verbal and physical abuse of employees by the Union should they attempt to work during a strike, removal of operations to other branches

[76] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, automatically become the findings, conclusions, decision and order of the Board, and all objections thereto shall be deemed waived for all purposes.

in the event of a strike, or other reprisals, for engaging in union activities.

(c) Discouraging membership in United Electrical, Radio & Machine Workers of America (UE), or in any other labor organization, by terminating or laying off employees, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

(d) Withholding any wage review or wage increase to which its employees would otherwise be entitled but for their union activities or their recourse to the processes of the Board.

(e) Failing or refusing to bargain collectively with the above-named labor organization, as the exclusive bargaining representative of all employees in the appropriate unit described above.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization, as the exclusive representative of its employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Offer the employees named below immediate and full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in "The Remedy" section of the Trial Examiner's Decision.

John Schaetzel	Arlene Eisch
Roger Fields	John Matajac
Barbara Neary	Linda Morris
Michael Klaus	Cynthia Behling

(c) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to reinstatement upon application, in accordance with the Selective Service Act, and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The Remedy" section of the Trial Examiner's Decision.

(e) Post at its Milwaukee, Wisconsin plant, copies of the notice attached hereto as "Appendix."[77] Copies of said notice, on forms provided by the Regional Director for Region 30, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[78]

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[77] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[78] In the event that this recommended Order is adopted by the Board this provision shall be modified to read: "Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

It is further recommended that the consolidated complaint be dismissed insofar as it alleges violations not specifically found herein.

Further, it is recommended that, in Cases Nos. 30-RC-1338 and 30-RC-1334, the election on November 12, 1970, be set aside and the petitions dismissed

Dated at Washington, D. C.

/s/ Benjamin B. Lipton
Benjamin B. Lipton
Trial Examiner

NOTICE TO EMPLOYERS

Posted By Order Of The
National Labor Relations Board
An Agency Of The United States Government

After A Trial In Which Both Sides Had The Opportunity To Present Their Evidence, The National Labor Relations Board Has Found That We Violated The Law And Has Ordered Us To Post This Notice; And We Intend To Carry Out The Order Of The Board, And Abide By The Following:

WE WILL NOT ask you anything about your union activities or the union activities of your fellow employees in a manner which would coerce you regarding your rights under the Act.

WE WILL NOT threaten you with closing down the machine shop; closing down the plant; loss of our customers; bankruptcy; discharge; layoffs; removal of our operations to other branches if you strike; refusal to hire employees who have a union in mind, or with "harm," or other reprisal, in order to stop you from joining or helping a union, or keep you from voting for a union in a Board election.

WE WILL NOT promise or give you wage increases, job opportunities or transfers to another branch, or other benefits to keep you from joining or supporting a union.

WE WILL NOT withhold any wage reviews—or wage increases, or deprive you of any other benefits, because of your union activities or recourse to the processes of the National Labor Relations Board.

WE WILL NOT spy on employees, or make you believe we are spying, in order to find out who has joined the Union or is in favor of the Union.

WE WILL NOT tell you that the Union is not reputable, or not a suitable representative, and urge you to select another union in a manner that would interfere with your free choice of bargaining representative under the Act.

WE WILL NOT tell you that, with the Union, there will be a wall between the employees and the Company, and you can no longer deal directly with the Company concerning your problems and grievances.

WE WILL NOT tell you or threaten you that a union-forced strike will definitely result if the employees select a union to represent them.

WE WILL NOT tell you or threaten you that there will be verbal or physical abuse by the Union if you seek to go to work in case of a strike.

WE WILL NOT refuse to bargain collectively with United Electrical, Radio & Machine Workers Of America (UE).

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of the rights guaranteed employees in the National Labor Relations Act, which are as follows:

To engage in self-organization;

To form, join or help unions;

To bargain collectively through a representative of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refuse to do any or all of these things.

Since it has been found that we unlawfully terminated the employees named below, WE WILL offer to give them back their regular jobs, or if those jobs no longer exist, we will give them substantially equivalent jobs; and WE WILL pay them for the earnings they lost because of the discrimination, plus 6 percent interest.

John Schaetzel	Arlene Eisch
Roger Fields	John Matajac
Barbara Neary	Linda Morris
Michael Klaus	Cynthia Behling

WE WILL notify all these employees, if presently serving in the Armed Forces of the United States, of their right to reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL, upon request, bargain collectively with United Electrical, Radio & Machine Workers of America (UE) as the exclusive representative of our employees in the appropriate unit, and put into a signed agreement any understanding reached. The appropriate unit is:

> All employees at the Milwaukee, Wisconsin, plant, including office clerical employees, but excluding outside sales-servicemen, professional employees, managerial employees, confidential employees, guards and supervisors as defined in the Act.

Wisconsin Bearing Company
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 2nd Floor, Commerce Building, 744 North 4th Street, Milwaukee, Wisconsin 53203 (Tel. No. 414 - 272-3861).

UNITED STATES OF AMERICA

Before The National Labor Relations Board

* * (Caption—Cases 30-CA-1361, 30-CA-1394, 30-CA-1420, 30-RC-1338, 30-RC-1344) * *

ORDER CORRECTING DECISION AND ORDER

On September 21, 1971, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding from which there is an inadvertent omission in the Order.

It Is Hereby Ordered that said Decision and Order be, and it hereby is, corrected by adding the following paragraph to the Board's Order:

> It Is Further Ordered that the election conducted in Cases 30-RC-1344 and 30-RC-1338 on November 12, 1970, be, and it hereby is, set aside, and the petitions for certification of represenstatives in said cases dismissed.

It Is Further Ordered that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., October 6, 1971.

By direction of the Board:

John C. Truesdale
Deputy Executive Secretary

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[1] 193 NLBR No. 35. Case 30-RC-1344 was erroneously numbered 30-RC-1334 in that Decision and Order. It is herein corrected.

United States Of America

Before The National Labor Relations Board

Thirtieth Region

GENERAL COUNSEL EXHIBIT 10A

Good morning ladies and gentlemen. I'm sure we all know this is our last chance to sit down and talk together before the voting tomorrow. First, I would like to thank you very much for your patience and your interest in these past few weeks. I know they haven't been easy weeks for any of us. I know that there have been some very high feelings, perhaps even some bitterness. I hope that after tomorrow, any hard feelings that may have existed can be eased and put completely out of our minds and that we can work together, perhaps better than ever before. Now this is a very serious election. The outcome of it may have a very grave and lasting effect on your Company and on you and your job and on those who depend upon you and this is why, of course, that we've all taken the time we have to try to look at this entire matter from all angles.

You'll notice for the first time in my life I'm talking to you from a written text. I hate to do this but Mr. Clifford tells me that it's necessary. I guess he's tired of so many lawsuits. I know I am.

In our first letter we said that we're not in business to fight unions but to try to make this such a decent place to work that no outside union is necessary. When this election began I guess I really thought that I had done everything I could over the years. In a good many ways, I realize now that this just isn't so. It isn't so because there are quite a number of legitimate complaints and problems that haven't been solved. There appear to be some inequities in the salary situation and there most certainly appears to be less than adequate communication. Obviously, the greatest part of this blame falls on my shoulders. But I don't feel that it's ever too late in any company where there is goodwill

to discuss these things openly and freely. And having done so, I hope that all sides can see that while there are the shortcomings I've admitted, there also have been some pretty sincere efforts to make this a worthwhile place to work.

So I'm glad we've had these meetings. And if no union prevents it, we can and we will have more.

Now during the course of our earlier meetings, we were asked why, if we weren't opposed to having internal discussions and meetings, why we were so opposed to this outside union. I think to a great extent, it can be summed up in two words—bitterness and fear of strikes.

What do I mean by bitterness? I mean just this, that for this union to make employees think that it's worthwhile paying the dues, the assessments, and running the risk of a strike that an outside union can force, the union has to keep hammering home the idea that your Company basically wouldn't do anything at all for you unless you had an outside union, that basically your own Company is your own enemy. They realize that unless they can persuade you to think of your Company as your enemy, you will realize that there isn't any need for these outsiders and there certainly isn't any need to pay dues to them. And they are skilled at injecting and inflaming hatred and bitterness between us. For example, just a few of the things they have called us up to now, "gutter tactics," "false opinions," "crimes," "deception," "scare talk," "misrepresentation," "tricks," "chislers." If in fact we were all that bad, I think you would have found out about it long before this. But the tragic part of this is that this is just the beginning. Because, you see, in order to whip up enough hatred to persuade you to go on a strike, they have to do far more than they have already done against each other, so that what we've seen up to now may be only the beginning.

Let me quote to you from this outside union, "Union-forced strikes are just scare talk." That's what they

tell you now. But when they were organizing over at Allen-Bradley, and trying to persuade the people there to join, don't you imagine this is exactly what they told them? Of course it was! And don't you imagine they told the people over there, "Oh, strikes are just company scare talk." But to force Allen-Bradley to check off union dues and force everybody into their union, they just finished an 11 week strike. What guarantees do you have that they wouldn't do that here? Now what's so horrible about union-forced strikes? Well, it depends. There are some relatively short strikes, a week or two. In nice weather, fishing weather, hunting weather, where you can stand the loss of income, perhaps it isn't too bad. But suppose the union-forced strike hangs on, and on, suppose it begins, say, the first of December, suppose it lasts through December, January and February, as such strikes have been known to do. What happens to the employee? Is there always work available? Where? Does this union guarantee to find you work? Where? What happens to the Company. Well, first of all, we certainly would try to service our accounts through the other branches. Naturally, we would try to get the Butler Branch going soon enough to take up part of the slack here in Milwaukee. But you know and I know that it just wouldn't be the same thing, because we haven't had a strike and I suppose it takes some experience to know how to do business in a strike. And you and I know that our customers aren't going to wait for the strike to be over. That they would have to go to someone else. Suppose, for example, we lost maybe 30% of our business here in Milwaukee. Then when the strike ended, we could have lost maybe 30% of our jobs. Do you honestly think that that would be worthwhile? Maybe if you were one of the 70% whose job wasn't lost you might think so. But if you were one of the 30% who found himself or herself, in these increasingly bad times, looking for a job that couldn't be found, you might then wonder if it was all worthwhile. Worthwhile to hurt yourself, your fellow employees, and your Com-

pany to try to handle a situation that could much more easily be handled in other, better, simpler, easier ways.

And Mr. Clifford has told us that, under the law, in an economic strike we're entitled to keep operating, we're entitled to hire replacements to permanently replace anyone who goes on such a strike. I'm not saying we would want to do this, and certainly we would not do this right away, because we would hope that the majority would want to come to work and that we could somehow manage.

But suppose there was union-provoked violence? If you wanted to come to work, would you be willing to try to walk through a line of people using foul language and pushing and shoving? As you well know, these things do happen on some picket lines. And no union that I've ever heard of uses only Company employees on a picket line. They generally have a fair number of pretty rough customers that they bring in from other places. Unfortunately, the law says this is perfectly legal. So if you have some idea of walking through a picket line composed only of your friends, and just having some gentle lady-like discussion, give it another thought. You could easily be confronted by some real tough customers that you didn't know and who didn't know you and couldn't care less about you.

Now as to this union's attitude towards strikes. First, they've ridiculed the idea there could possibly be such a thing. Second, they very carefully avoided any listing of their own strikes, how many there were or how long they lasted or what the issues were and so forth. They have avoided describing their strike benefits, if they exist, what they are, when they start, how long they last and, above all, who makes the decisions? For example, are they made in Milwaukee, by whom? Are they made in New York? According to their constitution, they seem to be made in New York.

As you well know, it's our sincere hope that you will feel that you really don't need an outside union. But

in any event, it would seem that this one is probably among the least suitable ones that could possibly be found. Now to the best of our knowledge, they have four contracts here in Milwaukee. So far we can find out, not in one single instance do they represent any office people. They've talked about representing office people, but have they told you where or shown you any office contracts. I know you wouldn't go out and buy a T-V without looking at it. You wouldn't buy a stove without looking at it. But here you're being asked to sign up for something that could have the most severe effect possible upon your job, and to the best of my knowledge they haven't been willing to show anybody any of their so-called office contracts.

I'm sure you realize that not all unions are the same—any more than all companies are. And that there has just got to be something really different about this one—else why were they thrown out of the AFL-CIO? If you doubt this, please, before you vote, call up either of the two legimate electrical unions and ask them?

Nor have they ever denied that for years they jumped on the bandwagon of every Communist backed cause in the United States! They have never denied that they spent thousands, maybe hundreds of thousands, of dollars of membership dues money fighting the U.S. Government over the anti-Communist laws. And three men who were the top men of this union then are still the three top men.

I admit again, and certainly not proudly, that we have made quite a few mistakes. But I hope you believe that this isn't the total record. As you know, I recently reviewed the salaries of every individual person here. While there certainly are cases where increases weren't granted where they should have been, there have been substantial increases granted and there have been regular and periodic increases granted. We've done these things without pressure from any outside union. Certainly the profit sharing

plan was put in without any union pressure, and the insurance, holidays, vacations.

While we aren't asking any medals, we have tried to do the right thing. For example, we asked the girls to go to keypunch school at our expense, so they could stay with us; we've given people one, two, sometimes three transfers at their own request, to try to help them find the work they'd like best—we are even right now trying to work our transfers to save jobs that may be threatened by the tailspin in business.

As I say, we don't ask for medals, because these are all things that any decent Company will do, voluntarily, for its people, because we're not going to operate here very long without you. The IBM equipment doesn't run itself. The pricing doesn't get done without you. Nothing around here happens without people.

Now we've tried, over the years, when there have been problems, to avoid letting the impact of those problems fall on the backs of our employees. We've tried to save jobs where we can and if this Butler situation works out the way I would like it to work out, it's entirely possible we can save everybody's job who wants to continue to work here, with no loss of seniority. We certainly would like to try.

Can this union, or any other, make many such claim? Can it turn back today's economic tide and save jobs for its members? Let's just look at three companies, big ones, all represented by unions—Bethlehem Steel, U.S. Steel, Allen-Bradley. Literally, I'm not exaggerating, literally, thousands of union members have been laid off in those plants in the past few months, each one of them carrying a union card in his pocket. What does this prove? It proves what you already know; that jobs are made by customers and not unions. You know our sales are down and I'm telling you now our profits are off by 50%. If there was ever a time when a union could do harm in this little place, it must be right now.

What is it that we all want? What do you want? What does the Company want? What does the union want? Well, I think it's safe to say that any employee wants to be paid fairly, to be treated fairly, and have as much security as possible. I think it's safe to say that any company wants to get the best people it can, who will help to give the kind of satisfaction to the customers that make customers keep coming back, over and over again.

Now, how does this union fit into this? Ask yourself, will this union help us to get any customers? Will the union help us to keep any customers? Will the union help us keep working together, or will it try to force us to work against each other? For example, this union has told you that we're going to eliminate the benefits, cut out the vacations, drop the profit sharing, eliminate holidays! Now since the Company put them in without a union, this union hasn't suggested any reason at all why the Company would try to take things away! On the contrary it's our wish, and our hope, that as we weather the economic storm here together, and we will, with your help, that things will get better in direct proportion to our combined ability to make them better.

So, please, think carefully. Have you friends who work in other places where there isn't a union? Sure you do. Do you know of one single instance, just one, where any non-union company took anything away? Of course not! But I know of a company where a union bargained away a cost-of-living plan to get a dues checkoff! Almost every single effort this union has made for the past month is to drive bitterness between us! Now isn't that just one hell of a way to start a relationship?

We went back last week and reviewed as many newspaper articles as we could about this Allen-Bradley situation, where this union is. The recent 11 week strike there had one big issue, the issue of the union shop and dues chek off. Now maybe you say to yourselves, "I can take 11 week union-forced strike over this."

But why? What benefits? If employees are out of work in order to try to force a company to have a union shop and a dues check off, who loses? In a situation like that, is a union honestly trying to help people—or to help itself?

I guess I've painted a pretty gloomy picture of what the future could be here with this outside union in here. Frankly, I'm scared of what they might do. I honestly believe that they not only could, but would, do harm—harm that might be impossible to repair.

But suppose you did vote against this union in order to give us a chance to work more closely together? What then would the future be? Well, let's look at different areas. First of all, job security. As you know, we're trying very hard to minimize the impact of loss of business. As I mentioned, in the big unionized plants, they don't make any such efforts at all. When business is down, people are sent home. It's as simple as that. We don't want to be that way. It's not only to your advantage but also to ours to work closely together. For example, we'd like to be able to staff the Butler office with people from here—people who want to go. As to Benefits. Union or no union, we have no intention of reducing or eliminating any benefits. Just so long as we can afford to pay, we'll pay.

Now would a union help us to be able to afford benefits, or would a union hurt this situation? Please, think it over, because I know you'll come to the right conclusion. As to salaries. This is an area where, as I've said before, we could have done better. But in which way, in your opinion, are we likely to make the most progress and to obtain the best results—working with each other or working against each other, in the way this union is trying to force us?

The union asked a question the other day, would we have any meetings in the future? I myself think that

such meetings would be a big help. Surely they wouldn't be a total solution but they could take us a long way in solving our problems. Certainly everyone here is able to speak up and speak out, and I hope, at least, that we're able to listen to you, and to listen with intelligence and with understanding.

In conclusion, let me thank you again for your interest, your patience and understanding. Certainly, no matter what happens, there will be no recriminations.

If you are sincerely convinced that there is no hope at all for you with your own Company—and also sincerely convinced that this particular union is the best one for you—then I suppose you will feel you must vote against us. But I earnestly beg you—please don't vote for this outside union as some kind of experiment—just to see if it would work out or not. Because if it didn't work—it could do harm that could never be undone—and there would be no turning back.

If, on the other hand, you feel that by working together, trying hard to see each other's problems and each other's point-of-view,—in peace and harmony—we can make progress, if you can feel it in your hearts to give us this chance to work together, then I know you'll vote for the Company.

Thank you again.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued January 17, 1973

January 18, 1973

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

WISCONSIN BEARING COMPANY, *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	On Petition to Review Cross-Application for Enforcement of an Order of the National Labor Relations Board. No. 71-1920

ORDER

Having considered the briefs and oral argument submitted on behalf of petitioner and the Trial Examiner's Decision, and having reviewed the portions of the record emphasized in petitioner's briefs, we are satisfied that the findings are supported by substantial evidence and that the findings and conclusions adequately support the Labor Board's Decision and Order dated September 21, 1971. Said Order is, therefore,

ENFORCED.

A True Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Feberuary 6, 1973

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

WISCONSIN BEARING COMPANY, *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for Review of an Order of the National Labor Relations Board. No. 71-1920

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1497

WISCONSIN BEARING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees concerning their and other employees' union activities (Pet. App. 8a-12a); promising and granting wage increases and other benefits (Pet. App. 29a-31a); withholding wage reviews and increases (Pet. App. 29a-31a); urging its employees to select a collective bargaining representative other than the Union[1] (Pet. App. 23a-24a); stating that, with union representation, the employees could no longer deal directly with the Company (Pet. App. 29a); and threatening to engage, and engaging, in surveillance of union activities (Pet.

[1] United Electrical, Radio and Machine Workers of America (UE).

App. 12a-15a). The Board found that the Company further violated Section 8(a)(1) by threatening to close its machine shop and plant, and to remove operations to its other branches in the event of a strike (Pet. App. 27a-28a); that unionization would result in loss of customers, layoffs, discharges, and bankruptcy (Pet. App. 27a-28a); that a union-forced strike was inevitable and would result in verbal and physical abuse to non-strikers (Pet. App. 28a). In addition, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by laying off seven employees for engaging in union activity, and by laying off employee Barbara Neary in order to camouflage the layoffs of known union supporters (Pet. App. 31a-42a). Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union.

The Board ordered the Company to cease and desist from the unfair labor practices found and from infringing "in any other manner" upon its employees' exercise of the rights guaranteed in Section 7 of the Act (Pet. App. 51a-52a). The Board also ordered the Company to bargain with the Union upon request and to offer eight employees reinstatement with backpay (Pet. App. 52a-53a). The court of appeals enforced the Board's order (Pet. App. 67a).

2. Except as noted in "3" below, petitioner does not directly challenge the Board's findings that it violated Section 8(a)(1), (3), and (5) of the Act. Rather, its basic contention is that it was denied due process of law because the Administrative Law Judge, in his decision, failed to list, for each allegation in the complaint, the testimony which supported it (Pet. App. 7a-9a). This objection was not presented to the

Board in the Company's exceptions to the Administrative Law Judge's decision, and thus judicial review thereof is foreclosed under Section 10(e), 29 U.S.C. 160(e), of the Act.[2] *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256. In any event, since the Judge coupled his findings with discussions of the specific evidence upon which they were based (see, *e.g.*, Pet. App. 8a-11a, 31a-42a), he considered petitioner's evidence and indicated his reasons for accepting or rejecting it. He is not required to go further and relate the testimony upon which he relied to each of the allegations of the complaint.

3. Petitioner also contends (Pet. 9-10) that a written speech read to the employees by General Manager Werner was not coercive, but merely a legitimate expression of opinion. However, the Administrative Law Judge correctly found (Pet. App. 25a-29a) that the speech constituted threats of reprisal under the standards enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 597-598, 617-620.

4. Finally, petitioner contends (Pet. 10-11) that the court of appeals should have considered employee turnover in determining whether the Board's bargaining order was proper. Since petitioner did not raise this issue before either the Board or the court below, it cannot raise that issue now.[3]

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[2] The Company merely urged before the Board that the Judge's unfair labor practice findings were not supported by the evidence and were contrary to the law (Court of Appeals App. 81-90).

[3] In any event, *National Labor Relations Board* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (C.A. 5), certiorari denied, 400 U.S. 957, upon which petitioner relies (Pet. 10), can be read as resting on the circumstance, absent here, that it involved a remand to the Board for additional findings in light of *Gissel*, *supra* (see 427 F. 2d at 448). Cf. *National Labor Relations Board* v. *Kaiser Agricultural Chemicals*, 473 F. 2d 374, 384-385 (C.A. 5).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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